APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 2075

WILLMUT GAS & OIL COMPANY, PLAINTIFF,

VS.

EUGENE FLY, FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

Opinion.

This suit was instituted on January 6, 1954, in the District Court against the former Collector of Internal Revenue to recover excess profit taxes paid to him in the amount of $7,558.65 for the year 1944 and in the amount of $11,016.43 for the year 1945 by the Plaintiff as taxpayer. These excess profit taxes were paid pursuant to an assessment made by the former Collector and this suit was brought under 28 U.S.C.A. §1346 for the recovery thereof. Jurisdiction is assailed in limine by motion to dismiss. The Defendant contends that exclusive jurisdiction of this case is vested in the tax court by 26 U.S.C.A., §732. The Defendant filed its answer and the parties stipulated as to the facts in this case.

Where jurisdiction depends on subject matter, the question of whether jurisdiction exists is easily confused with the question as to whether or not the complaint states a cause of action as the Court said in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249. This Court necessarily must analyze the complaint to

determine whether or not this Court of limited jurisdiction has any power under an Act of Congress to grant the relief requested. §732 of this Act authorized the taxpayer to file a petition with the Tax Court "for a redetermination of the tax" under this sub-chapter and authorized the Tax Court to make an additional assessment for any deficiency which it found in its examination of the claim for over-payment of such taxes. 26 U.S.C.A., §732(c), provides:

> "Finality of determination. If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board."

26 U.S.C.A., §732(d) provides that such redetermination questions shall be considered by the Chairman and not less than two other members of the Board and that the decision of such special panel shall not be reviewed by the Board and shall be deemed the decision of the Board or Tax Court. The Plaintiff states in its reply brief: "Complainant did not at any time base its claim and right under §711 (b) (1) (J) (i), but on the contrary based its claim under §711 (b) (1) (J) (ii)." It contends that it did not rely solely on §711 but relied upon the fact that the Commissioner himself determined the existence of an abnormality in agreeing to the 1937 depreciation schedule.

An examination of the authorities cited on both sides does not reveal any case and no authority has been found whereby this action may be treated as other than a §711 suit. The contention of the Plaintiff with respect to the inconsistency of the Commissioner does not, in any opinion, present any question which was not committed by that Act

of Congress (§732) to the Tax Court as a necessary part of the redetermination question which is presented here. Paragraph (c), §732, seems unquestionably dispositive of the matter of the jurisdiction of this Court in providing that the determination of either a 711 problem or a 722 problem that "the determination of such question shall not be reviewed or redetermined by any court or agency, except the Board." In *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, a suit was instituted against the United States in the Court of Claims for the recovery of excess profit taxes under the Revenue Act of 1918. Significantly, the Court held the Court of Claims without jurisdiction of that suit. In *Brown Paper Mill Co.* v. *Commissioner of Internal Revenue*, 255 F.2d 77, the United States Court of Appeals for the Fifth Circuit was requested to review a decision of the Tax Court regarding excess profit taxes under the relief provision thereof appearing as §722 and the Court held that it had no jurisdiction over such question which was committed exclusively to the Tax Court.

No case cited or has been found on independent research to uphold the jurisdiction of this Court in this kind of case. The merits of this case are not reached and the judgment to be entered here will not reflect my views on the merits of this case. It is my opinion that this Court is without jurisdiction and that the motion of the Defendant to dismiss this suit ought to be sustained. An order to that effect should be immediately presented by the United States Attorney for my signature.

This September 5, A. D., 1961.

s

United States District Judge.

APPENDIX "B".

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19543

WILLMUT GAS & OIL COMPANY,
Appellant,

versus

EUGENE FLY, FORMER COLLECTOR OF INTERNAL REVENUE. (HENRY FLY, Administrator of the Estate of Engene Fly, Deceased, substituted in the place of Eugene Fly, Deceased),
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.
(September 10, 1963.)

Before PHILLIPS,* CAMERON, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: In this case the taxpayer, Willmut Gas & Oil Company, seeks recovery of World War II excess profits taxes of approximately $18,000, paid in 1944 and 1945 as a result of an allegedly erroneous assessment. The district court dismissed the complaint on the ground that the court had no jurisdiction to review the correctness of the Commissioner's action granting World War II excess profits tax relief solely by reason of Section 711(b) (1) (J) (ii) of the Internal Revenue Code of 1939.

*Of the Tenth Circuit, sitting by designation.

Section 732(c)[1] vests jurisdiction exclusively in the Tax Court to review such action of the Commission. 197 F. Supp. 19. The taxpayer contends that it cannot be compelled to assert its rights only in the Tax Court and that to require it to do so would amount to a deprivation of property without due process. We affirm.

By the plain language of Section 732(c) the Commissioner's determination of abnormal deductions "shall not be reviewed or redetermined by any court or agency except the Tax Court." The courts have uniformly recognized that this section means what it says. In *Crowell-Collier Publishing Co.* v. *Commissioner*, 2 Cir. 1958, 259 F.2d 860, *cert. den'd.* 1958, 358 U.S. 928, 72 S. Ct. 314, 3 L.ed. 2d 302, the Court held, *inter alia*, that Section 732 precluded judicial review of the Tax Court finding that the taxpayer was not entitled to a disallowance under Section 711 of certain alledgedly abnormal expenses in the determination of base-period income. This Court reached a similar result on the question whether the review of a determination under Section 722, which is also within the scope of Section 732 (c), is vested solely in the Tax Court. *Brown Paper Mill Co.* v. *Commissioner*, 5 Cir. 1958, 255 F.2d 77, *cert. den'd.* 1958, 358 U.S. 906, 79 S. Ct. 229, 3 L.ed. 2d 227; *A. B. Frank*

1. *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

55 Stat. 17-18 (1941), as amended, 56 Stat. 798 (1942), 59 Stat. 669 (1945). On the stipulated facts of this case, the issue involved is the abnormality of certain extraordinary deductions for depreciation taken by the taxpayer in base period years (Record, pp. 30-35). The disallowance of these deductions is governed by Internal Revenue Code of 1939, § 711(b)1(J).

Co. v. *Commissioner*, 5 Cir. 1954, 211 F.2d 497. See also *United States Rubber Co.* v. *Commissioner*, 2 Cir. 1956, 274 F.2d 307, *cert. den'd.* 1960, 363 U.S. 827, 80 S. Ct. 1596, 4 L.ed. 2d 1522; *Green Springs Dairy, Inc.* v. *Commissioner*, 4. Cir. 1953, 208 F.2d 471. These decisions dealt with review of denials of administrative relief, rather than the direct judicial review of the Commissioner's actions. The difference is not material. The decisions clearly recognize that review is to be left entirely in the administrative domain. See *Schilling* v. *Rogers*, 1960, 363 U.S. 666, 674, 80 S. Ct. 1288, 4 L.ed. 2d 1478. In a case analogous to the instant case, involving excess profits taxes under the World War I statute, the Supreme Court held that the Court of Claims was without jurisdiction to review the Commissioner's refusal to make a special assessment based on abnormal conditions. *Williamsport Wire Rope Co.* v. *United States*, 1928, 277 U.S. 551, 48 S. Ct. 587, 72 L. ed. 985. The Court noted that the Court of Claims, and hence the district courts, also, are without jurisdiction where the statute creating the claim expressly refers it to an executive branch or an administrative agency. *Id.* at 561.

The taxpayer presses the argument that limitation of review to the Tax Court amounts to a deprivation of property without due process. Constitutional restraints on the Federal Government's taxing power are few indeed. They are fewer still on federal procedures for tax refunds. The Supreme Court has noted that, in general, due process is satisfied if the taxpayer, after appropriate notice, has an opportunity to be heard as to the amount of the tax by giving him the right to appear at some stage of the proceedings before the tax is irrevocably fixed. See *McGregor* v. *Hogan*, 1923, 263 U.S. 234, 44 S. Ct. 50, 68 L.ed. 282. cf. *Londoner* v. *City of Denver*, 1908, 210 U.S. 373, 28 S. Ct. 708, 52 L.ed. 1103. The Court has held that the Commissioner of

Internal Revenue may be given final authority to grant a refund, thereby precluding court review. *Wilson & Co.* v. *United States*, 1940, 311 U.S. 104, 61 S. Ct. 129, 85, L.ed. 71. As the Court stated in *Standard Hoisery Mills, Inc.* v. *Commissioner*, 4 Cir. 1947, 249 F.2d 469:

> The questions involved in such cases are complicated and highly technical; and the manifest purpose of Congress was to allow review of the Commissioner's action only by an administrative court having special competence in the premises. This was clearly within the power of Congress, which might have made the Commissioner's determination final if it had seen fit to do so.

Such determinations are a "delicate and complex phase of revenue administration" which are not entrusted to a large number of courts, because "none . . . have ready access to the information necessary to arrive at a proper conclusion in revising his [the Commissioner's] decisions; whose experience in passing upon questions of this character would be limited; and whose varying decisions would tend to defeat, rather than promote . . . equality in the revenue law." *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. at 562.

In this case the taxpayer has no election to determine where it will seek relief. Congress has specified an exclusive remedy. Congress has provided for a hearing and review in the Tax Court. Due process requires no more. There is no constitutional guaranty of a hearing in an Article III court. See *Anderson Nat'l Bank* v. *Luckett*, 1944, 321 U.S. 233, 64 S. Ct. 599, 88 L.ed. 692; *City of Tacoma* v. *Taxpayers of Tacoma*, 1958, 357 U.S. 320, 339-41, 78 S. Ct. 1209, 2 L.ed. 2d 1345.

We hold that in accordance with Section 732(c) the taxpayer's claim may be asserted only in the Tax Court.

The judgment of the court below is therefore AFFIRMED.

CAMERON, Circuit Judge, I concur in the result.

APPENDIX "C"

Title 28, *U.S.C.A.*, Section 1254:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

"(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

APPENDIX "D"

Title 28, *U.S.C.A.*, Section 2101:

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment

or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

"(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

"(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

"(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ

within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

APPENDIX "E".

Title 26, *U.S.C.A.* (1939), Section 732:

"(a) Petition to the Tax Court. If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

"(b) Deficiency found by Board in case of claim. If the Board finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Board further finds that there is a deficiency for such year, the Board shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Board becomes final, be assessed and shall be paid upon notice and demand from the collector.

"(c) Finality of determination. If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

"(d) Review by special division of the Tax Court. The determinations and redeterminations by any division of the Tax Court involving any question arising under section 721 (a) (2) (C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court."

APPENDIX "F"

Title 26, *U.S.C.A.*, (1939), Section 3772:

"(a) Limitations

"(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

"(2) Time. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after

the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

"(3) Reconsideration after mailing of notice. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun. This paragraph shall not operate (A) to bar a suit or proceeding in respect of a claim reopened prior to June 22, 1936, if such suit or proceeding was not barred under the law in effect prior to that date, or (B) to prevent the suspension of the statute of limitations for filing suit under section 3774(b)(2).

"(b) Protest or duress. Such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

"(c) Cross references

* * *

"(d) Suits against collector a bar. A suit against a collector (or former collector) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits instituted after June 15, 1942, in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court where the petition to the Tax Court was filed after such date.

"(e) Credit treated as payment. The credit of an overpayment of any tax in satisfaction of any tax

liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability to the collector in office at the time such credit is allowed."

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

WILLMUT GAS & OIL COMPANY,
Plaintiff,
vs.
EUGENE FLY, formerly Collector of Internal Revenue for the Internal Revenue District of Mississippi,
Defendant.
} No. 2075

Civil Complaint

1. The Parties hereto are:

(a) Willmut Gas & Oil Company, a corporation duly chartered under the laws of the State of Delaware, but qualified to do and doing business in the State of Mississippi; and

(b) Eugene Fly, a resident of the City of Jackson, Hinds County, Mississippi, and formerly occupying at all times herein complained of, the office aforesaid and charged with the duties in that behalf provided.

2. Jurisdiction of this Court arises by reason of diverse citizenship, the amount in controversy, exclusive of interest and costs, is in excess of $3,000, and this demand is based upon the statutes of the United States pertaining to the internal revenue laws, namely: Internal Rev-

enue Code, whereunder plaintiff claims the right to recover from defendant under a proper interpretation of said statute by the Court of the facts incident, which are not in dispute.

3. That plaintiff herein seeks to recover as having been unlawfully paid under protest to the defendant for the year 1944 the sum of $7,558.65, in two payments, one of $7,546.73 on the 7th day of September, 1951, and the other of $11.92 on the 25th day of October, 1951; and for the year 1945, $11,016.43 in two payments, one of $10,529.28 on the 7th day of September, 1951, and the other of $487.15 on the 25th day of October, 1951, the same having been wrongfully exacted as deficiencies under the income and excess profits tax statutes of the United States, being the Internal Revenue Code.

4. Plaintiff having precedently paid on the 15th day of March, 1945, for the year 1944, the sum of $46,578.11, and on the 15th day of March, 1946, for the year 1945, $39,182.17, being all the taxes lawfully exigible of and from Plaintiff by the United States as income and excess profits taxes, there was made by defendant for the year 1944 a deficiency assessment for excess profits taxes in the sum of $5,701.36, and an allowance thereagainst for income tax in the amount of $267.50 which, with statutory interest, became the amount of $7,558.65 shown preceding; and, for the year 1945, a deficiency assessment for excess profits taxes was made similarly in the amount of $19,532.20, with an allowance thereagainst for an overassessment of income tax in the amount of $11,608.49 which, with statutory interest, became the amount of $11,016.43, likewise shown preceding; and, by reason of the deficiency assessments foregoing described, the said additional amounts including interest were wrongfully exacted.

5. That plaintiff made due demand for repayment as shown by Exhibit "A" and Exhibit "B" hereto annexed and made part hereof. So to repay; the said defendant wrongfully failed and refused for a period of more than six months after the filing of said claims, respectively, and thereby this cause of action became perfected.

6. Heretofore, upon the 20th day of February, 1934, plaintiff acquired at foreclosure sale in this Honorable Court a pipeline for transmission of natural gas, said line extending from the Jackson, Mississippi, Gas Field to the City of Hattiesburg, Mississippi, and embraced in said purchase were distribution systems at Hattiesburg and small towns between Hattiesburg and Jackson. A plat showing said system is hereto annexed marked Exhibit "C" and made a part hereof as if fully copied herein.

7. Plaintiff purchased said pipe line with said distribution systems at foreclosure as aforesaid to afford "Mississippi Gas for Mississippians", having arranged through ownership of wells and purchases to obtain said gas in the Jackson Field for transmission to its distribution systems and sales through such distribution systems, the Jackson Gas Field having been discovered in the year 1930.

8. That said plaintiff was duly entitled under the laws of the United States to recover as non-taxable, or as a tax free deduction from its income otherwise taxable, depreciation upon its said property and duly made returns showing such authorized depreciation during the test years with which this controversy is concerned, namely: 1936, 1937, 1938, and 1939, as well as until all of its investment in said property had, so far as was consistent with the required accounting, exhausted.

9. That unexpectedly the Jackson Gas Field in, to-wit: 1938, began to fail rapidly, it precedently having been

assumed in the natural gas industry that said field was more extensive than it was and that it would not become exhausted until at least 1950.

10. That when said field became exhausted said pipe line of plaintiff would thereby have become worthless because at that date no gas adjacent to said pipe line was available for transmission therethrough and as a result, based upon the exhaustion of said Jackson Gas Field, special deduction was allowed by the United States to plaintiff for the years 1936, 1937, 1938 and 1939 in addition to that which had been by plaintiff claimed in its returns filed prior thereto, the amounts of such special additional deductions being such as to vouchsafe to plaintiff full tax credit for recovery of its investment which, without such special deduction allowed additionally would have been lost to plaintiff without opportunity to recover the same through the tax benefit or tax credit contemplated by the taxing scheme under the Internal Revenue Code.

11. Thereafter, United Gas Pipe Line Company, herein called "United", constructed from Louisiana and states beyond an eighteen-inch pipe line into Jackson to make gas available to a pipe line owned by said United from Jackson to Mobile and beyond. United refused to supply plaintiff with gas upon the completion of said pipe line and plaintiff without United's consent forceably connected its said pipe line with said pipe line of United on the 19th day of January, 1940, and received gas from United without a contract until the 20th day of August, 1943 paying to United therefor 30¢ per thousand cubic feet.

12. Upon the 20th day of August, 1943, plaintiff and United made a contract whereby plaintiff was paid for its said pipe line the sum of $350,000, to be paid $100,000 upon execution of deed and gas purchase contract; $100,000 upon

the 15th day of January, 1944; $50,000 upon the 15th day of January, 1945; $50,000 upon the 15th day of January, 1946; and $50,000 upon the 15th day of January, 1947; which amounts were on said dates well and truly paid, and pursuant thereto under a Certificate of Convenience and Necessity said pipe line was conveyed to said United, said plaintiff retaining its distribution systems and has continued to operate said systems, receiving from United gas therefor.

13. That as to the purchase rates for the gas obtained from United as mentioned preceding, there has been and still is controversy between United and plaintiff, reference being made to Docket No. G-1158 before the Federal Power Commission, an agency of the United States, at Washington, D. C.

14. All payments for the sale of the transmission line, discussed foregoing, were made upon their respective due dates and were lawfully accounted to the United States by plaintiff for income and excess profits tax purposes, with appropriate restoration therein as taxable income made voluntarily by plaintiff, to account fully, tax-wise, for the depreciation normally taken in its returns by plaintiff and, also, for the special loss deductions heretofore described.

15. The depreciation taken normally in the returns of plaintiff respecting said pipe line was upon the basis that the law doth allow, plaintiff having acted in its depreciation practice as a reasonable, prudent, person and such action was acquiesced in by the United States.

Wherefore, plaintiff is entitled to have and recover of said defendant said sums, together with interest thereon and all costs, wherefor it hereby sues

And, for another and further cause of action. Plaintiff says that defendant being lawfully indebted to it on the 13th day of November, 1951, in the sum of $7,558.65 and on the 13th day of November, 1951, in the sum of $11,016.43, plaintiff made demand upon defendant then and there to pay said sums on said dates with interest at the rate of 6% per annum. Thereafter, to so pay said amounts or any part thereof, said defendant has wholly failed and refused and still fails and refuses, wherefor hereasto an action has accrued and judgment therefor hereunder is demanded.

Green, Green and Cheney
801 Plaza Building
Jackson, Mississippi

Reynolds S. Cheney
Garner W. Green
801 Plaza Building
Jackson, Mississippi

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.
JACKSON DIVISION

WILLMUT GAS & OIL COMPANY,
Plaintiff,

vs.

EUGENE FLY, formerly Collector of Internal Revenue for the Internal Revenue District of Mississippi.
Defendant

Civil Action No. 2075

Motion to Dismiss.

Defendant, by Robert E. Hauberg, United States Attorney, moves the Court to dismiss this action upon the following grounds:

1. This Court is without jurisdiction of the subject matter of this action under the provisions of Section 732(c) of the Internal Revenue Code.

2. The complaint fails to state a claim upon which relief can be granted by this Court.

.....
United States Attorney,
Attorney for Defendant.

APPENDIX "I"

In our opinion, with deference, the decisions cited by (a) the Court of Appeals and (b) the Assistant Attorney General in his brief therein, are inapposite. They can be readily differentiated:

I. Court of Appeals citations:

1. *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 88 L.ed. 692, which is inapposite, for therein the Court held a Kentucky statute requiring both state and national banks to turn over to the State, after fourteen and twenty-five years, abandoned deposits. In short, it was appropriate that substantially these funds be transferred to the State for proper utilization. Compare *Security Savings Bank* v. *California*, 263 U.S. 282, 68 L.ed. 301; *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 95 L.ed. 1078; *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 7 L.ed. 2d 142, wherein the position of this Court thereasto was more at large set forth.

2. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 2 L.ed. 2d 1345. Therein Tacoma sought construction of certain improvements whereby a fish hatchery owned and operated by the State of Washington, would be in-

undated. After certificate from the Federal Power Commission, possessing plenary jurisdiction, had been appropriately obtained therefor litigation was lawfully had in the Court of Appeals whereasto this Court said, 357 U.S. 336:

> "* * * It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. Cf. NLRB v. Cheney California Lumber Co., 327 U.S. 385, 388, 90 L.ed. 739, 741, 66 S. Ct. 553. So acting, Congress in Sec. 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. Safe Harbor Water Power Corp. v. Federal Power Com., (C.A. 3, Pa.) 124 F.2d 800, 804, cert. den. 316 U.S. 663, 86 L.ed. 1740, 62 S. Ct. 943. It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which 'shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part,' and that '(t)he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification . . .' (Emphasis added.) * * *. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. * * *"

How this decision may effectually take from Willmut that uniformly accorded as to Federal taxes paid by Willmut to Fly under protest, we, with deference, fail to appreciate.

3. *Crowell-Collier Publishing Co. v. Commissioner*, C.A. 2, 259 F.2d 860. Therein petitioner specifically in-

voked the jurisdiction of the Tax Court for rectification in accordance with Section 732(c) and thereby forewent any review by the Court of Appeals.

4. *Brown Paper Mill Co.* v. *Commissioner*, C.A. 5, 255 F.2d 77. The Court of Appeals recognized the gratuitous nature of the rights conferred by Sections 327 and 328 under the former act and Section 732(c) of this Act. It therein specifically said, p. 79:

> "* * * The denial of judicial review is constitutional, as Section 722 is a special relief provision extended as a matter of legislative grace. James F. Waters, Inc., v. Commissioner of Internal Revenue, 9 Cir., 1947, 160 F.2d 596. See also Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 48 S. Ct. 587, 72 L.ed. 985."

Still later, the Court said in *Barefield* v. *Byrd*, C.A. 5, 320 F.2d 455, 457:

> "* * * Congress may create rights in individuals against itself and establish special tribunals aside from the courts, to administer and enforce the rights created. As the Supreme Court said in United States v. Babcock, 250 U.S. 328, 331, 39 S. Ct. 464, 63 L.ed. 1011, 1012, (1918), '(T)he United States, 'when' it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts.' It may limit the individual to administrative remedies. Tutun v. United States, 270 U.S. 568, 576, 46 S. Ct. 425, 465, 70 L.ed. 738, 741 (1925)
>
> * * *
>
> "This court in Ford v. United States, 230 F.2d 533 (5 Cir. 1956), and Acker v. United States, 226 F.2d 575 (5 Cir. 1955), cert. denied 350 U.S. 1088, 76 S. Ct. 874, 100 L.ed. 870 (1955), held that a decision by the Administrator was not reviewable by the courts. In Ford, 230 F.2d at pages 533 and 534 the court said 'The assertion, now made on the appeal, that it was

likewise an effort to review the correctness of the Administrator's action under the Administrative Procedure Act, 5 U.S.C.A., Sec. 1001 et seq., fares no better since Section 10, 5 U.S.C.A., Sec. 1009, specifically excepts administrative actions when the "(1) statutes preclude judicial review * * *." While the Congressional intention to preclude judicial review of administrative action must be clearly and positively reflected Heikkila v. Barber, 345 U.S. 229, 73 S. Ct. 603, 97 L.ed. 972, cf. Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S. Ct. 591, 99 L.ed. 969, and Marcello v. Bonds, 349 U.S. 302, 75 S. Ct. 767, 99 L.ed. 1107, that standard is met here both by the intrinsic nature of this as an act of pure gratuity from the sovereign's grace, Acker v. United States, supra, and the categorical declaration that, except for certain specified matters for which a judicial remedy is created, the Administrator's decision on all questions of law or fact concerning a claim for benefits or payments under any act administered by the Veterans Administration shall be final, conclusive and beyond the power of any court to review. 38 U.S.C.A., Sec. 11a-2, Brasier v. United States, 8 Cir., 223 F.2d 762, and see Federal Power Commission v. Colorado Interstate Gas Company, 348 U.S. 492, 499, 500, 75 S. Ct. 467, 99 L.ed. 583, 592.' * * *."

Compare *Lynch* v. *United States*, 292 U.S. 571, 78 L.ed. 1434; *Flemming* v. *Nestor*, 363 U.S. 603, 4 L.ed. 2d 1435.

In *Brown Paper Mill Co.* v. *Commissioner*, C.A. 5, 255 F.2d 77, with deference, the Court erroneously sought authority in *James F. Waters, Inc.* v. *Commissioner*, C.A. 9, 160 F.2d 596, wherein the declaration was, p. 598:

"* * * It is well settled that where statutes create special relief, credits, or the like, such concessions are matters of legislative grace. New Colonial Co. v. Helvering, 292 U.S. 435, 440, 54 S. Ct. 788, 78 L.ed. 1348, and that Congress may preclude judicial review of the determinations of an administrator in respect

to them. Compare Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 561, 562, 48 S. Ct. 587, 72 L.ed. 985; Heiner v. Diamond Alkali Co., 288 U.S. 502, 507, 53 S. Ct. 413, 77 L.ed. 921; Welch v. Obispo Oil Co., 301 U.S. 190, 193-196, 57 S. Ct. 684, 81 L.ed. 1033. Consult also Lynch v. United States, 292 U.S. 571, 587, 54 S. Ct. 840, 78 L.ed. 1434; Duquesne Steel Foundry Co. v. Commissioner, 3 Cir., 41 F.2d 995, affirmed 283 U.S. 799, 51 S. Ct. 491, 75 L.ed. 1422."

5. *A. B. Frank Co.* v. *Commissioner*, C.A. 5, 211 F.2d 497. Therein the proceeding was in the Tax Court, exercising its invoked executive authority.

6. *United States Rubber Co.* v. *Commissioner*, C.A. 2, 274 F.2d 307. This cause arose before the Tax Court in its administrative branch.

7. *Green Springs Dairy, Inc.* v. *Commissioner*, C.A. 4, 208 F.2d 471. In this case, the opinion shows, p. 473:

> "The taxpayer then filed petition with the Tax Court in respect to each notice and prayed for a redetermination of the deficiencies set forth by the Commissioner in his notices. * * *"

And when he so thus did voluntarily, he made inapposite that which otherwise would have been the law, namely, p. 475:

> "The taxpayer relies upon the established rule that the opportunity to present a case and to be heard is fundamental to the validity of proceedings by administrative tribunals as well as by courts. In many decisions it has been held that the right to due notice of the claims of the opposing parties and an opportunity to be heard in a fair and open hearing are assured to every litigant by the Federal Constitution. See Morgan v. United States, 298 U.S. 468, 56 S. Ct. 906, 80 L.ed. 1288; 304 U.S. 1, 58 S. Ct. 773, 82 L.ed. 1129; Joint Anti-Fascist Refugee Committee v. Mc-

Grath, 341 U.S. 123, 165, 166, 71 S. Ct. 624, 95 L.ed. 817. * * *."

8. *Schilling* v. *Rogers*, 363 U.S. 666, 4 L.ed. 2d 1478. Therein this Court said, 363 U.S. 676:

> "We conclude that the Trading with the Enemy Act excludes a judicial remedy in this instance, and that because of this, as well as because of the discretionary character of the administrative action involved, the Administrative Procedure Act, by its own terms (ante, p. 1482), is unavailing to the petitioner.
>
> * * * *
>
> "* * * the availability of such relief presupposes the existence of a judicially remedial right. No such right exists here."

Dissenting opinion of Mr. Justice Brennan, 363 U.S. 682:

> "The Court does not demonstrate any policy on which Congress may have been acting and from which it might be inferred that judicial review was impliedly precluded under Sec. 32. Congress clearly precluded independent lawsuits, but there is no demonstration that it acted in pursuance of any purpose which would be broad enough impliedly to negate judicial review of administrative action as well. So there is no reason why the general principle should not apply: 'Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers.' Harmon v. Brucker, supra (355 U.S. at 581, 582):
>
> "* * * To my mind, McGrath v. Kristensen, 340 U.S. 162, 95 L.ed. 173, 71 S. Ct. 224, is squarely in point. * * *"

Followed in *Harue Sakamoto* v. *Kennedy*, C.A. 9, 298 F.2d 608, 610; *United States* v. *Wiley's Cove Ranch*, C.A. 8, 295

F.2d 436, 441; Dissenting opinion of Mr. Justice Brennan cited in *Deering Milliken* v. *Johnston*, C.A. 4, 295 F.2d 856, 861.

9. *Williamsport Wire Rope Co.* v. *United States*, 77 U.S. 551, 72 L.ed. 985. Therein the basic question was whether the Court of Claims had jurisdiction against the United States for a tax recovery. While the Court of Appeals' characterization is apposite, it is imperative that this Court keep in mind that under Sections 327 and 328, the wronged taxpayer consciously sought that which was not given him by the Constitution nor the laws, but was vouchsafed solely under the pardoning power by the executive, which, when accepted, became conclusive. Compare *Burdick* v. *United States*, 236 U.S. 79, 59 L.ed. 476.

10. *McGregor* v. *Hogan*, 263 U.S. 234, 238, 68 L.ed. 282. We find naught contra therein, the decision being, p. 238:

> "* * * Where a city charter gives property owners an opportunity to be heard before a board of assessors with respect to the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot thereafter be heard to complain of such assessments as unconstitutional. Farcomb v. Denver, supra, p. 11; cited with approval in Milheim v. Moffat Tunnel Improv. Dist., 262 U.S. 710-724, 67 L.ed. 1194-1202, 43 Sup. Ct. Rep. 694, in reference to an analogous situation."

11. *Londoner* v. *City of Denver*, 210 U.S. 373, 52 L.ed. 1103. Under the universal rule in this Court where the individual collector acts and the payment is made under protest with specificity as to defects that which may have occurred in the preparation of the assessment whereunder the tax is exacted is not such a notice as to preclude individual responsibility of the Collector for wrongfully ex-

acting that whereasto he was without constitutional right. We repeat *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 260, 86 L.ed. 1455, 1458:

> "* * * Such a 'personal' remedy against the collector, derived from the common-law action of indebitatus assumpsit, has always been part of our fiscal administration. * * *."

We commend the declaration of Mr. Justice Moody in the *Londoner* case, 210 U.S. 386:

> "* * * But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. * * *"

12. *Wilson & Co.* v. *United States*, 311 U.S. 104, 84 L.ed. 71. Naught contra is therein, because the defendant was the United States in the Court of Claims.

13. *Standard Hosiery Mills, Inc.*, v. *Commissioner*, C.A. 4, 249 F.2d 469. This case is, with deference, inapposite.

II. Assistant Attorney General's citations:

1. In the cases of *Bradford Machine Tool Co.* v. *Commissioner*, C.A. 6, 260 F.2d 950; *Brown Paper Mill Co.* v. *Commissioner*, C.A. 5, 255 F.2d 77; *L. E. Carpenter & Co.* v. *Commissioner*, C.A. 3, 264 F.2d 230; *Colonial Amusement Co.* v. *Commissioner*, C.A. 3, 173 F.2d 568; *Colorado Milling & El. Co.* v. *Commissioner*, C.A. 10, 205 F.2d 551; *Crowell-Collier Publ. Co.* v. *Commissioner*, C.A. 2, 259 F.2d 860; *Duquesne Steel Foundry Co.* v. *Commissioner*, C.A. 3, 41 F.2d 995; *Helms Bakeries* v. *Commissioner*, C.A. 9, 263 F.2d 642; *A. B. Frank Co.* v. *Commissioner*, C.A. 5, 211 F.2d 497; *Hewitt-Robins Inc.*, v. *Commissioner*, C.A. 3, 282 F.2d 868; *George Kemp Real Estate Co.* v. *Commis-*

sioner, C.A. 2, 182 F.2d 847; *Patent Button Co.* v. *Commissioner*, C.A. 6, 256 F.2d 726; *Pohatcong Hosiery Mills* v. *Commissioner*, C.A. 3, 162 F.2d 146; *Puget Sound Pulp & Timber Co.* v. *Commissioner*, C.A. 9, 277 F.2d 803; *Pure Transportation Co.* v. *Commissioner*, C.A. 7, 292 F.2d 267; *Standard Hosiery Mills* v. *Commissioner*, C.A. 4, 249 F.2d 469; *United States Rubber Co.* v. *Commissioner*, C.A. 2, 274 F.2d 307; and *James F. Waters, Inc.*, v. *Commissioner*, C.A. 9, 160 F.2d 596, there was a voluntary invocation of the executive clemency which precludes judicial review under the declaration in *Heiner* v. *Diamond Alkali Company*, 288 U.S. 502, 507, 77 L.ed. 921, 925:

> "* * * The respondent's tax could only be computed in accordance with Sec. 301 or under Sec. 328. The former prescribes the elements to be considered, and error in the computation remains subject to judicial correction; the latter grants the taxpayer the benefit of discretionary action by the Commissioner and precludes judicial revision or alteration of the computation of the tax."

2. *Lynch* v. *United States*, 292 U.S. 571, 78 L.ed. 1434, is confidently relied upon by Willmut.

3. *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 48 L.ed. 795. With deference, naught contra is found therein where the company, having accepted a grant whereby it saved itself from serious loss, thereafter sought as to that which it had voluntarily done to claim from its own act an impairment of the Constitution.

4. *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440, 78 L.ed. 1348, 1352, insofar as apposite, held only:

> "* * * Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

5. *Welch* v. *Obispo Oil Co.*, 301 U.S. 190, 81 L.ed. 1033. Note that apparently voluntarily the taxpayer had invoked the specific gratuity vouchsafed which, if invoked, precluded review. It is respectfully submitted that unless the taxpayer thus voluntarily did, he could not be transferred from an Article III to an Article I category whereunder all judicial rights disappeared and the taxpayer was left with the stark reality of administrative inviolability.

6. *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 72 L.ed. 985, differentiated *supra*.

Assuming that the Assistant Attorney General will rely here, as he did before the Court of Appeals, on these cases, with deference, we find naught contra to our contentions.

PROOF OF SERVICE.

I, Garner W. Green, of the firm of Green, Green and Cheney, attorneys of record for Willmut Gas & Oil Company, depose and say that on the day of November, 1963, I served a copy of the foregoing Petition for Writ of Certiorari on Honorable Louis F. Oberdorfer, Assistant Attorney General, Department of Justice, Washington, D. C., and E. R. Holmes, Jr., Esquire, Assistant United States Attorney, Federal Building, Jackson, Mississippi, attorneys of record for Respondent, by mailing same, postage prepaid.

Sworn to and subscribed before me, this the day of November, 1963.

Notary Public

My Commission Expires: